

MINUTES

**MONTANA SENATE
56th LEGISLATURE - REGULAR SESSION
COMMITTEE ON STATE ADMINISTRATION**

Call to Order: By **CHAIRMAN MACK COLE**, on February 9, 1999 at
10:00 A.M., in Room 331 Capitol.

ROLL CALL

Members Present:

Sen. Mack Cole, Chairman (R)
Sen. Don Hargrove, Vice Chairman (R)
Sen. Jon Tester (D)
Sen. Jack Wells (R)
Sen. Bill Wilson (D)

Members Excused: None.

Members Absent: None.

Staff Present: Keri Burkhardt, Committee Secretary
David Niss, Legislative Branch

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: SB 383, 2/4/1999
Executive Action: SB 292

HEARING ON SB 383

Sponsor: SEN. DON HARGROVE, SD 16, BELGRADE

Proponents: Dale Beland, Representing Gallatin County Comm.
Michael Lane, Gallatin County Open Lands Board
Mona Jamison, Gallatin County
Jane Jelinski, Montana Association of Counties
Phil Olson, Gallatin County Commissioner
Tom Langel, Rancher, Developer

Opponents: Steve Snezek, Montana Association of Realtors

Allen McCormick, Montana Association of Planners

**Anne Hedges, Montana Environmental Information
Center**

Roger Nerlan, Rancher, Gallatin County

**Phillip Maechling, Missoula Office of Planning and
Grants**

Janet Ellis, Montana Audubon

Opening Statement by Sponsor:

{Tape : 1; Side : A; Approx. Time Counter : 8 - 25}

SEN. DON HARGROVE, SD 16, Belgrade, explained we need to plan for growth in Montana. The tools for growth do not require mandates. **Senate Bill 97** was adopted rapidly by the Senate and is an integral part of this bill. The purpose of this legislation is to provide local government with the option of preserving agricultural land and open space through cluster development. Agricultural land is increasingly being taken out of production because farmers and ranchers are being forced to sell their land to generate income. This legislation authorizes local government to adopt special cluster development regulations to promote cluster development in exchange for preservation of open space agricultural land. This creates an incentive system whereby the developer buys transferable development rights for what is called preservation area, which will remain as agriculture or open space land, and receives the right to cluster build on smaller lots. By doing this, the capital maintenance costs for infrastructure are reduced through the concentration of public service. Everything is optional. There must be a willing buyer and a willing seller. The county participation is also optional. If a county chooses to participate, this is an incentive to have a master plan and SB 97 has defined this as a growth policy. The growth policy has been put into this bill as well. If a county has a growth policy then it can identify preservation area and they can transfer developmental rights to a cluster development area. This may be smaller; leaving land open and giving the land owner a way to receive some cash without having to sell all the land off. The growth policy, in the associated cluster development regulations, determines the parameters and are based on particular areas. Certain requirements exist in the bill. There has to be minimum of 40 acres preserved, a minimum of 5 units in a cluster, minimum safety standards for roads with fire protection, as well as maintained public health standards. The land owner gets to have as many and probably more development rights as they would under the current circumstances. The land owner may convert those to money and retain the rest of the land in production to farm, sell, or pass on to future generations. The land is still his. As some incentive for the individual, and

one of the disincentives to the bureaucracy involved, is that he is exempted from environmental assessments, from park dedication requirements, and most impact fees if they exist. It includes an incentive to maintain open space agricultural land, and it might keep the farmer or rancher in business, and it is an incentive to develop a growth policy. This is an innovative planning tool that preserves private property rights through out every step of its implementation. It provides an option that will allow smart development, keep the agriculturalist in business, and it doesn't cost the tax payer's money.

Proponents' Testimony:

Dale Beland, Representing Gallatin County Commissioners, stated he has been working for the past 8 months in pursuit of this bill specifically at the request of the Open Space Task Force. He handed out **EXHIBIT(sts32a01)**. He explained Gallatin county is growing quicker than other parts of Montana, at growth rate of 21% percent. The problem they have in helping people grow smart is that they do not have county wide zoning and it will be a long time before the county comes together and decides what, if any, kind of county wide zoning. They have an opportunity to try some other tools, other than county wide zoning to guide growth. This bill is intended to achieve that purpose by giving voluntary participation to landowners in counties who wish to use it. Regular subdivision could continue with no significant effect. For those counties that choose to exercise their option for alternative subdivision review there are some significant changes that must be met. There must be an amendment to the local subdivision regulations to even access this type of opportunity. There also must be a local growth policy or master plan in place, addressing areas of concern, that are a regular part of discussion on development, and are also the basis for an adequate subdivision review. This provides an incentive for landowners to make sure the growth plan reflects the interests of landowners in a fair and equitable way, that protects property rights, while still addressing significant issues of public health and safety. He said it is consistent with **SB 97**. He emphasized this is a local option. Trying to enforce control or direction from some other area is inappropriate. It is desirable and equitable to make the tool available to people who want to use it. He said this is a complicated bill and there may be some minor portions that require clarification. He added they are willing to continue to respond to concerns.

{Tape : 1; Side : A; Approx. Time Counter : 25 - 49}

Michael Lane, Gallatin County Open Lands Board, said their mission is to work with the county commissioners and the citizens

of Gallatin county to preserve natural lands and encourage the economic liability of agriculturally productive lands. They want to accomplish this through voluntary programs, to ensure the protection of open space lands, through the identification or establishment of funding sources, tax measures, and other incentives. One thing **SB 383** has that the Open Space Task Force looks for is the incentives and voluntary participation. One problem they see with the present legislation is that it allows people who have subdivided their property on paper into 10 or 20 acre ranchettes, to take a section of ground and put in 30 or more housing units on it and cause a portion of the ranch to no longer be economically viable. If those homes were clustered, they believe that it would be smarter development.

Mona Jamison, Gallatin County, submitted two letters for the record. The first letter of support was from Nick Salmon **EXHIBIT (sts32a02)**. The second letter, from the Gallatin county commissioners, was a copy of **EXHIBIT(1)** submitted by the first proponent, Mr. Beland. This bill provides an option to preserve the family farm for the farmers and ranchers. She said the bill allows the developers to, "get more bank for their infrastructure buck". This bill preserves agricultural land and provides citizens with open space. Everyone benefits from this bill. This bill is innovative and new, and people are scared of change. She reiterated that it is optional. If the local government has identified agricultural land as land to be preserved within its growth policy, development can still occur in that preserved land. If a farmer or rancher, owning the preserved land, does not wish to sell the transferable development right the local government has attributed to his land, he doesn't have to. Instead, he can sell it to a developer, who can proceed under the regular master plan requirements and subdivision requirements that are currently in effect. If this legislation works correctly, a developer who owns land in a designated growth area is enabled to go to the farmer or rancher, whose land has been identified as land that should be preserved, and offer to buy that development right. Then he will get higher density in that growth area. We are suppose to preserve our open space and develop infrastructure. She added they want this to be an incentive system for the developer. This is a bill of option and incentive. The regulations that may have been good 20 or 30 years ago, are not always good or adaptable for today's conditions. Gallatin County is losing prime state agricultural land at a rapid rate. Section 5, the minimum requirements for subdivision regulations, is viewed as a detriment by opposition. She said everything that is listed there is currently in law and is what developers must comply with in order to build a subdivision, with exception of the cluster development regulation. In section 7, we have tried to give incentive by

saying that they do not have to follow the traditional regulations that reflected the needs 20 years ago. Section 7 has cluster development regulations that the governing body must adopt if they choose to participate in this kind of a program. She said they have been working on this bill for a long time and have tried to listened to concerns and have responded with some amendments. Those amendments make it clear that if people want to build in a preservation area they still can. In close she urged the committee not to let the past prevent us from saving Montana's land.

Jane Jelinski, Montana Association of Counties, said their subdivision subcommittee has studied this bill and has decided to support it. This is optional. Counties can decide if they want to exercise it. There will be opposition to transfer of development rights. Bridger Canyon is an example of the success of transfer of development rights. They support this bill.

Phil Olson, Gallatin County Commission, said they are experiencing a lot of growth in their area and urged the committee to support this bill.

Tom Langel, Rancher and Developer, stated we have to do something to preserve our agricultural lands. We have to create incentives for ranchers and farmers, not mandates that are forced on them. Currently, there are bills out there that do the opposite of this bill, and won't work. This bill will give the farmer, rancher, or developer the incentive to keep their property intact and go to a smaller density by clustering.

Opponents' Testimony:

Steve Snezek, Montana Association of Realtors, said he opposes this bill in its current form. He added the intent of this bill, to protect open space land and allow reasonable development, is good but many of these issues have not been explored well enough. The main portion of the bill describes and authorizes the transfer of development rights. This is an excellent concept that has been used in other states. It is currently used in some counties and zoning districts in Montana. He said he doesn't know if we should statutorily authorize the transfer of development rights concept. He said he believes this needs further study. Those studies should include how other states use it, does it work, and how do you assign development rights to acres. These questions should be addressed and reported back to the legislature next session. Until we know those answers, he doesn't think the transfer of development rights should be in statute. Second, the bill uses the term impact fees. The intent is to exempt these cluster developments from impact fees and the

language accomplishes this, however, impact fees are not defined. He added that, "impact fee", is not used anywhere else in Montana code. If the language stays in and the bill is passed, in a backward way, impact fees would be authorized by the legislature. This is a question that should be debated in another forum, not in this bill. Third, this bill is dramatically effected by another section of code. **Senate Bill 383** requires growth policy language that identifies preservation of agriculture land, open space, growth areas and the appropriate density for these areas. Another section of current law allows local governments to require subdivision plaitis to conform to the provisions of the master plan, which will be the growth policy if **SB 97** passes. The intent of this bill is to give the developers the choice of doing a cluster development or a standard development, however, if the proposed standard subdivision is in a growth area or in a preservation area, and if the subdivision does not comply with the goals of the master plan, then the local government may deny this standard subdivision. He said the he is not sure the amendments would fix the bill enough for the Montana Association of Realtors to support it.

{Tape : 1; Side : B; Approx. Time Counter : 49 - 64; Comments : Tape over at 49}

Allen McCormick, Montana Association of Planners, said he represents over a hundred members, comprised of both citizen and professional planners. He said they are always looking out for innovative techniques that can help the state in planning. He said the current Montana code provides the options necessary to implement the intent in the provisions of this bill. The intent in this bill is very sound. He said they strongly support the preservation of agricultural land. This has been put forth as an option, but any option should be legally and practically sound. There are too many questions about how this would be implemented and whether or not citizens' rights would be upheld. This bill requires the comprehensive plan become a regulatory document because the provisions of the transferable development rights and this alternative subdivision review would be guided solely by the comprehensive plan. A lot has been said on whether the comprehensive plan should be a guide or a regulatory document. Currently, the development of a subdivision has to go through the environmental assessment, planning review, and a county commissioner review. This process guarantees that citizens have the right to participate in that process. This bill will allow people to buy one development right from the agricultural area and add it to a subdivision, which can exempt them from having to go before the planning board, from doing environmental assessment, from paying impact fees, and from paying for their share of the capital facilities. It is not fair to the people

who don't want to buy a development right and its not fair to the citizens who anticipated being a part of this process and now are excluded from it. He said Gallatin County is already implementing the transfer of development rights system. He added it is working, it is preserving agricultural grounds, and it came from the citizens which created the zoning regulations that created the transferable development right system. He said they don't need authorization to do transfer of development rights. The processes in place right now involve the planning board, citizens, county commissions, and citizens' commissions, in a complete planning process that can accomplish the very intent of this bill under current law. He said he strongly supports **Senate Bill 342**, which accomplishes agricultural preservation through another method and said it is a better alternative than this bill.

Anne Hedges, Montana Environmental Information Center, stated they oppose this bill even though the concepts are good. She said they support **SB 97**. The problem with this bill is he did not incorporate all of the provisions necessary to protect the public health and welfare. This bill exempts cluster developments for review under the public interest criteria. The criteria for review include the effect of the subdivision on agriculture, agriculture water user facilities, local services, the natural environment, wildlife and wildlife habitat, and public health and safety. She said review for subdivisions of those criteria are critical to protecting the public, the consumers, and the environment. At some point in the process, those criteria must be reviewed. This bill sets up a mechanism where those criteria may never be reviewed and it is one of the main reasons they rise in opposition. The growth policy this requires has a statement explaining how the governing body will define those public interest criteria and how the governing body will evaluate, but it doesn't require the governing body to evaluate those criteria. In order to support this bill, they have to have a mechanism guaranteeing those review criteria will be considered at some point in the process. The other concern they have has to do with the easement language. This bill allows for conservation easements either in perpetuity or for a period of years and can be as little as 15 years. There are very large subdivisions out there that have a 20 year development time horizon, and in 15 years they can develop the rest of that property, but only the additional property that they will be developing between year 15 and year 20 would have the public interest criteria reviewed. All of the old cluster area will never be reviewed for the public interest criteria. They are concerned these term easements which could be as short as 15 years and could lead to unscrupulous development. Those kind of loop holes need to be closed before they can support this bill.

Roger Nerlan, Rancher, Gallatin County, he said this bill is intended to protect agriculture but he sees it as more control and regulation. He said four years ago Gallatin County tried to enact a zoning regulation and was profoundly told no. If this bill is passed, county commissioners will be able to enact this legislation with nothing more than a public hearing, not a vote from the people. This sounds like back door zoning to him. He explained the steps if he were to subdivide his property and use this bill. First the local government would assign him a development right. It could be one per acre, one per 10 acres, one per 500 acres, and so on. Next, he would have to find someone to take the conservation easement. He said most of the entities that handle the conservation easement enjoy the open land but don't particularly like farming or cattle. After he gets this far he has to hire the lawyer to drop the agreement, and hope the government has created a receiver area for these development rights. Then he would hope that someone would decide to buy them. If he farmed in one of the receiver areas and he did not want wall to wall houses around his farm or ranch, a vote from the receiver area does not count. It will take a majority vote from the entire county to protest it.

Phillip Maechling, Mssoula Office of Planning and Grants, said this bill is unnecessary. They already have transfer of development rights and zoning that accomplishes these goals. He said there are more questions raised by this bill than answers. They have problems determining what the development right is. In their comprehensive plan they have guidelines, but it is not a rule. They feel they have guidelines and rules in place that will accomplish what this bill is trying to do.

Janet Ellis, Montana Audubon, replied that the term easement is a major problem. She also pointed out the potential of not having any public interest criteria reviewed for these subdivisions. They support the concept of preservation areas but there are a few problems that need to be fixed.

Questions from Committee Members and Responses:

{Tape : 1; Side : B; Approx. Time Counter : 64 - 76}

SEN. TESTER asked **SEN. HARGROVE** who determines the size of lots in the cluster development. **SEN. HARGROVE** said the growth policy will look at the whole area and will basically make those decisions. It will be a plan. He added everything is optional. The county does not have to participate. He said the bill drafter is here to answer any questions or to clarify things.

SEN. TESTER said at some point things do not become optional anymore. He asked when things are binding. **SEN. HARGROVE** said if you make an agreement and buy the development right from the preservation area and put it in the cluster area, at that point you have made an agreement. Before that point it is optional, under current law. There is no change to current law.

SEN. TESTER asked **SEN. HARGROVE** if this could already be done at the local level. **SEN. HARGROVE** said currently the transfer development rights could be done between zoned areas, but this is not between zoned areas.

SEN. TESTER asked about the aspect of not having public input on the development. **SEN. HARGROVE** said public interest is preserved and is in the list of things they require for the local regulations, in the government review, and in the growth policy.

SEN. WELLS asked if this bill applies primarily to Gallatin County and if other parts of the state support this as well.

SEN. HARGROVE said he thinks the entire state is in support of it and he has talked to a lot of people. He said he wouldn't be here if this wasn't good for the whole state. He explained an example of a county which uses this system in Colorado.

SEN. WELLS replied that the opponents indicated that this encroaches on their rights. He asked **SEN. HARGROVE** what incentives he has put into the bill to encourage some of the opponents to go along with this bill. **SEN. HARGROVE** said there are not as many incentives as he would like. The reason there are not as many incentives as he would like is because they are trying to get as many people involved as possible. He said the biggest incentive is that they are making it easy for the farmers and ranchers who are hurting.

SEN. WILSON asked **Mona Jamison** to comment. **Mona Jamison** said she has a couple of points. First, she said they are not changing the regulation requiring the governing body hold public hearings related to public health, safety, and welfare; including the environmental assessment. Section 76-3-605 of the code, requires a hearing and addresses some of those public interest criteria. Second, the growth policy itself requires public input. One of the public interest criteria is the impact on agricultural land. The growth policy requires an analysis of where the agricultural land is. This is a way of looking at some of those same criteria, through a different mechanism. No county can reject these requirements. She added this bill does not get rid of that particular part of the planning process. The bill gives incentive for private entities to purchase these development lots. Zoning is not a current option for the majority of land.

Zoning plans are extremely difficult to get passed. She said the opposition may be fear full of trying something new.

SEN. WELLS asked **SEN. HARGROVE** if they would be making transfer of development rights a marketable entity. **SEN. HARGROVE** said he believes they would not.

{Tape : 2; Side : A; Approx. Time Counter : 76 - 98; Comments : Tape changed at 76}

SEN. WELLS said if the bill is optional what is the objection. **Mr. Meckling** said one of the difficulties is determining what are the development rights. He said in Missoula, they don't have a calculable development right. They have an urban area plan that determines basic land use guidelines and natural resource guidelines to determine whether or not development is appropriate at whatever density is being proposed. Whether an area is zoned or not, the densities are based on what the planning guideline is. Currently, they can use the transfer of development rights through zoning. He said in their neighborhood plans they look at the same concept that is being proposed here. If its optional, it creates problems for them in terms of their own subdivision regulations because they already have cluster provisions. These allow cluster develop on the size of lot that is appropriate, according to the land use guideline. It is not necessary for them. They think this will confuse the issue instead of helping them.

SEN. WILSON asked where complying with public hearing requests or review criteria is addressed in the bill. **Mr. McCormick** said he is not sure and that is one of the problems with this legislation. Currently, there is a set of procedures in place that require certain subdivisions to follow an administrative process, a public hearing process, and an environmental assessment process. He said this bill requires an alternative subdivision review to be established, which would set up another set of subdivision regulations. It requires them to follow minimum public health and safety standards and establishes administrative procedures, but this bill suggests they do not have to follow the standard public hearing process. It is not explicit in the bill that they have to follow the normal procedures. He said in new Section 8, they are changing the procedures that are required of subdivisions by exempting proposed cluster development from environmental assessment. He said this bill changes the process that has been established for subdivision review.

SEN. COLE asked **Mr. Beland** to clarify the transfer of development further. **Mr. Beland** explained the way in which the local

government will establish criteria and procedures for transfer between jurisdictions. Most of the growth areas are going to be adjacent to existing cities that have infrastructure available. He said the process and mechanics of transfer of development rights will be subject to the local amendment of the local subdivision regulations. They will establish the process that works best for them. The fundamental driver for the process is a willing action between a willing seller and a willing buyer. He said currently they only have transfer of development rights in existing zoning districts. They lack the ability to conclude that they are going to have county wide zoning that would make this a useful tool. **SEN. COLE** asked if this would be tied down to a county. **Mr. Beland** said the bill is designed to present a choice by local government. If the local government decided that this was appropriate for their needs they would hold public hearings to amend their subdivision regulations and they would hold public hearings before their planning board to consider the amendment of the plan. He added Section 76-3-605 of the code addresses public input and is not amended by this bill. There may be some clarification required in the bill, but the intent is not to preempt public involvement. **SEN. COLE** asked if the cost would be decided between the buyer and seller. **Mr. Beland** said it would be between the two of them. This option would allow someone who owns land in a planned area to sell the transfer of development rights to someone who owns land in the growth area. He said people still have the right to do a regular subdivision.

{Tape : 2; Side : A; Approx. Time Counter : 98 - 110}

Closing by Sponsor:

SEN. HARGROVE explained this bill does not change the required review of a planning board. He said there are a lot of counties that don't want to be zoned. They want to preserve that option for people. The public interest and hearings would not change. The original concept had more incentives. He said if we don't take a step, we are being obstructionists. This is not a regulatory document in anyway and is a way of giving people options. He handed out the amendments **EXHIBIT(sts32a03)**. He said the counties are specifically authorized to charge for impact on public health and safety, and this will not change that requirement. He added he's not sure its such a good thing to have something that is calculable verses good planning. He said they don't want statewide zoning. The counties need to have the option to do things their way.

EXECUTIVE ACTION ON SB 292

{Tape : 2; Side : A; Approx. Time Counter : 110 - 118}

A brief discussion was held as to whether to include making false statements about one's own voting record.

Motion/Vote: SEN. WILSON moved that **SB 292 BE AMENDED. Motion carried 5-0.**

Motion/Vote: SEN. TESTER moved that **SB 292 DO PASS AS AMENDED. Motion carried 5-0.**

ADJOURNMENT

Adjournment: 11:58 A.M.

SEN. MACK COLE, Chairman

KERI BURKHARDT, Secretary

MC/KB

EXHIBIT (sts32aad)